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# THE MISPLACED TRUST IN THE DOJ'S EXPERTISE ON CRIMINAL JUSTICE POLICY

Shon Hopwood\*

PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION. By *Rachel Elise Barkow*. Cambridge and London: The Belknap Press of Harvard University Press. 2019. Pp. 291. \$35.

## INTRODUCTION

Criminal justice reform is in vogue. Experts from all sides of the political aisle agree that the criminal justice system is too big and too punitive, imposes too many social costs, and fails to adequately protect public safety.<sup>1</sup> Experts are not the only ones that understand the need for reform, as polling data consistently shows that a majority of Americans support criminal justice reforms.<sup>2</sup> Celebrities, like Kim Kardashian and Jay-Z, are intimately in-

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\* Associate Professor of Law, Georgetown University Law Center. I'd like to thank Margaret Rusconi and Andrew Lanham for their wise comments. I'd like to thank my two assistants, Molly Hogan and Nicholas Mecas-Faxon, for their research assistance and editorial guidance on this Review.

1. See NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 44–45 (Jeremy Travis et al. eds., 2014). Criminologists, economists, political scientists, legal scholars, politicians, and former law enforcement from both sides of the political aisle support criminal justice reforms. See, e.g., MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012); JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017); MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS (2015); JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM (2017); Megan Keller, *Mike Lee: Mandatory Sentencing Forces You to Ask 'Does This Punishment Fit the Crime?'*, HILL (Nov. 27, 2018, 10:19 AM), <https://thehill.com/homenews/senate/418413-mike-lee-mandatory-sentencing-forces-you-to-ask-does-this-punishment-fit-the> [<https://perma.cc/9HKV-3KGC>]; John G. Malcom & John-Michael Seibler, *Trump and Congress Earn a Conservative Victory with First Step Act*, DAILY SIGNAL (Dec. 21, 2018), <https://www.dailysignal.com/2018/12/21/trump-and-congress-earned-a-conservative-victory-with-first-step-act/> [<https://perma.cc/G3LA-58XV>]; Jessica Miller, *He Used to Be Utah's Top Federal Prosecutor. Now, Brett Tolman Is Trying to Change the System He Was a Part of*, SALT LAKE TRIB. (July 9, 2018), <https://www.sltrib.com/news/2018/07/09/he-used-be-utahs-top/> [<https://perma.cc/GJP3-WYLU>]; Emily Mooney & Arthur Rizer, *Dear AG Sessions: The White House and Math Agree—Crime Isn't Surging but Reform Should Be*, HILL (Aug. 22, 2018, 9:15 AM), <https://thehill.com/opinion/criminal-justice/402914-dear-ag-sessions-the-white-house-and-math-agree-crime-isnt-surging> [<https://perma.cc/5VXT-NVM9>].

2. See, e.g., Alex Busansky & Eli Lehrer, *Voters Are Driving Justice Reform*, HILL (Apr. 3, 2019, 6:00 PM), <https://thehill.com/opinion/criminal-justice/437174-voters-are-driving-justice-reform> [<https://perma.cc/8VM2-NLLK>] ("In a recent article, pollster Celinda Lake says

volved in national reform campaigns,<sup>3</sup> and there are more organizations and donor dollars to push for reform than ever before.<sup>4</sup> And reform has followed. Several states have recently passed reform measures on everything from money bail to increased discovery, sentencing, corrections, and collateral consequences.<sup>5</sup> Even the federal government has gotten in on the action: Congress recently passed, and the president signed, the First Step Act, a bill including sentencing and corrections reforms.<sup>6</sup> So one would think optimism is called for.

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that by a two to one margin, voters believe that our country relies too much on incarcerating people.”); C.J. Ciaramella, *Poll Shows Wide Support for Criminal Justice Reform Bill in Congress*, REASON (Oct. 18, 2018, 11:30 AM), <https://reason.com/2018/10/18/poll-shows-wide-support-for-criminal-jus/> [<https://perma.cc/GPR9-Z68F>]; *Overwhelming Majority of Americans Support Criminal Justice Reform, New Poll Finds*, VERA INST. JUST.: THINK JUST. BLOG (Jan. 25, 2018), <https://www.vera.org/blog/overwhelming-majority-of-americans-support-criminal-justice-reform-new-poll-finds> [<https://perma.cc/WRV3-2AFE>].

3. See, e.g., Helena Andrews-Dyer, *Kim Kardashian Is Still Fighting for Criminal Justice Reform*, WASH. POST (Jan. 31, 2019, 2:12 PM), <https://www.washingtonpost.com/arts-entertainment/2019/01/31/kim-kardashian-is-still-fighting-criminal-justice-reform/> (on file with the *Michigan Law Review*); Elias Leight, *Jay-Z, Meek Mill Launch ‘The Avengers’ of Criminal Justice Reform Organizations*, ROLLING STONE (Jan. 23, 2019, 3:54 PM), <https://www.rollingstone.com/music/music-features/jay-z-meek-mill-reform-alliance-criminal-justice-783228/> [<https://perma.cc/GSF2-7X7F>]; David Oscar Markus, *Kim Kardashian Is the Hero that Criminal Justice Reform Needs*, HILL (May 11, 2019, 10:30 AM), <https://thehill.com/opinion/criminal-justice/443196-kim-kardashian-is-the-hero-that-criminal-justice-reform-needs> [<https://perma.cc/A4ZQ-KMD5>].

4. See Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 YALE L.J.F. 791, 801–02 (2019).

5. See, e.g., Gabrielle Banks, *Harris County Approves Historic Bail Deal, Ends ‘Irreparable Harm,’* HOUS. CHRON. (July 30, 2019, 8:19 PM), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-approves-historic-bail-deal-ends-14253660.php> [<https://perma.cc/ST85-22LD>] (bail reform); C.J. Ciaramella, *Criminal Justice Reform Is Having a (Long Overdue) Moment*, REASON (Aug./Sept. 2019), <https://reason.com/2019/07/27/criminal-justice-reform-is-having-a-long-overdue-moment/> [<https://perma.cc/2RRX-ZV5P>]; Casey Leins, *Mississippi Leads the Nation in Criminal Justice Reform*, U.S. NEWS (May 3, 2019, 1:29 PM), <https://www.usnews.com/news/best-states/articles/2019-05-03/mississippi-leads-nation-in-criminal-justice-reform> [<https://perma.cc/NS74-X26B>] (sentencing and collateral consequences reform); Frances Robles, *1.4 Million Floridians with Felonies Win Long-Denied Right to Vote*, N.Y. TIMES (Nov. 7, 2018), <https://www.nytimes.com/2018/11/07/us/florida-felon-voting-rights.html> [<https://perma.cc/HAY5-8MUZ>] (collateral consequences reform); Beth Schwartzapfel, *“Blindfold” Off: New York Overhauls Pretrial Evidence Rules*, MARSHALL PROJECT (Apr. 1, 2019, 7:00 AM), <https://www.themarshallproject.org/2019/04/01/blindfold-off-new-york-overhauls-pretrial-evidence-rules> [<https://perma.cc/7VXM-BGLM>] (discovery reform); Jordan Smith, *Landmark California Law Bars Prosecutors from Pursuing Murder Charges Against People Who Didn’t Commit Murder*, INTERCEPT (Nov. 23, 2018, 11:30 AM), <https://theintercept.com/2018/11/23/california-felony-murder-rule/> [<https://perma.cc/U47C-Q2FM>] (sentencing reform).

6. See JULIE SAMUELS ET AL., URBAN INST., NEXT STEPS IN FEDERAL CORRECTIONS REFORM: EMPOWERING AND BUILDING ON THE FIRST STEP ACT 6 (2019), [https://www.urban.org/sites/default/files/publication/100230/next\\_steps\\_in\\_federal\\_corrections\\_reform\\_1.pdf](https://www.urban.org/sites/default/files/publication/100230/next_steps_in_federal_corrections_reform_1.pdf) [<https://perma.cc/P59Z-DTTL>] (“The [First Step Act] holds great promise in both incentivizing and improving programming for people housed in [the Federal Bureau of

But criminal justice reform is only happening at the margins. That is especially true at the federal level, where policymakers have yet to significantly reduce federal incarceration rates or provide the resources for systemic reform necessary to end mass incarceration.<sup>7</sup> If reform can increase both public safety and fairness while reducing our reliance on imprisonment, then why are major reforms of the federal criminal justice system so difficult to obtain?

Professor Rachel Elise Barkow<sup>8</sup> lays bare the reasons why the criminal justice system is so impervious to large-scale reform in her terrific new book, *Prisoners of Politics: Breaking the Cycle of Mass Incarceration*. Her thesis is that the same political dynamic that created mass incarceration has also made broad reform difficult to obtain:

Elected leaders fear being labeled as soft on crime, so they aim to appear as tough as possible, even if there is no empirical grounding for the approaches they endorse. Members of the public respond positively to this posture because they do not understand the ways in which these various policies can backfire in the long run and make us less safe. And law enforcement officials stand ready to fight any significant changes that would undermine their almost complete discretion to operate this system to their own advantage. (pp. 8–9)

She also argues that, by any empirical measure, the criminal justice system's poorly designed policies actually “*increase* the risk of crime instead of fighting it,” unnecessarily “ruin[ing] lives,” harming public safety, wasting billions of dollars, and imposing “catastrophic effects on millions of individuals and entire communities, especially poor people of color” (pp. 2, 5). The first part of her book is dedicated to demonstrating the failures of our current criminal justice policies, such as overly long sentences, insufficient support for rehabilitation, and unnecessarily harsh collateral consequences (pp. 17–18). She then explores the flaws in our political system that block re-

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Prisons (BOP)], reducing their risk of recidivism, allowing early transfer to prerelease custody for some, and shortening time served for almost all federally sentenced people currently in BOP custody, provided it is implemented as intended.”); Osita Nwanevu, *The Improbable Success of a Criminal-Justice-Reform Bill Under Trump*, NEW YORKER (Dec. 17, 2018), <https://www.newyorker.com/news/news-desk/the-improbable-success-of-a-criminal-justice-reform-bill-under-trump> [<https://perma.cc/VRK8-M749>] (“The act’s major reforms include making the 2010 Fair Sentencing Act’s reduction in the disparities between sentences for crack and powdered cocaine retroactive, granting judges more freedom from mandatory-minimum sentences, and expanding the time credits that prisoners can earn and put toward reducing their sentences or qualifying for release into transitional programs.”).

7. See Nwanevu, *supra* note 6 (“I get somewhat frustrated when I hear supporters of the bill call it transformational change, because it’s not. It’s progress. I think we have a long way to go, and a lot bigger reforms and investment of resources need to happen before we get to a transformation.” (quoting Kara Gotsch, the director of strategic initiatives for the liberal reform group the Sentencing Project)).

8. Vice Dean and Segal Family Professor of Regulatory Law and Policy and Faculty Director of the Center on the Administration of Criminal Law, New York University School of Law.

form (pp. 103–04). The third and final part of the book proposes a series of reforms (pp. 140–41).

To generate major justice reforms, Professor Barkow calls for institutional changes, such as placing checks on individual actors like prosecutors (Chapter Eight). She also argues for removing criminal justice matters from populist politics and instead lodging policy decisions with experts (pp. 14–16). I agree with her assessment of the problem and her solution to use an expert agency model to address criminal justice policymaking. That expert “body” would be “charged with analyzing all criminal justice practices to make sure they are promoting public safety and that the state (or federal government) is pursuing the least costly and least liberty-restrictive alternative to achieve a particular end” (p. 166).

In this Review, I address Professor Barkow’s point about law enforcement resisting reforms, with particular emphasis on the Department of Justice’s (DOJ) and the National Association of Assistant U.S. Attorneys’ (NAAUSA) opposition to nearly any federal criminal justice reform. Federal prosecutors often claim that they just enforce the law—no more, no less.<sup>9</sup> But their actions show the contrary. Through presidential administrations of both parties, the DOJ and the NAAUSA have affirmatively opposed most federal criminal justice reforms on issues involving sentencing, corrections, and clemency (pp. 6–8). Oftentimes they weigh in on issues for which their prosecutors have no expertise. Even worse, they have thwarted the goals of the very presidents they serve, especially if the president sets out to reform the system in ways that infringe on the DOJ’s prerogatives. If their opposition to reform were rooted in public safety or fairness, that would be one thing. But through their lobbying efforts, they often advocate for policies that make it easier for federal prosecutors to charge and incarcerate people—as if that is the only worthy goal of the federal criminal justice system.<sup>10</sup> And all too often federal policymakers—whether members of Congress, the White House, or the U.S. Sentencing Commission—have listened. As a result, there are now nearly 4,450 federal statutes and hundreds of thousands of federal regulations carrying criminal penalties,<sup>11</sup> excessively punitive fed-

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9. For example, speaking as attorney general, Robert H. Jackson once observed that prosecutors have a duty to “maintain a dispassionate, disinterested, and impartial enforcement of the law.” Robert H. Jackson, U.S. Attorney Gen., Address at the Twentieth Anniversary Dinner of the Federal Bar Association 6 (Jan. 20, 1940), <https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/01-20-1940.pdf> [<https://perma.cc/DJ5Y-5ZG5>].

10. See p. 7 (“[Prosecutors] benefit from the existing stable of broad laws with severe sentences because of the leverage it gives them to process their cases.”).

11. See JOHN S. BAKER, JR., HERITAGE FOUND., REVISITING THE EXPLOSIVE GROWTH OF FEDERAL CRIMES 1 (2008).

eral sentences,<sup>12</sup> and a federal prison population that has increased by 618 percent since 1980.<sup>13</sup>

As should be clear, this is less a book review and more an in-depth exploration of a key point Professor Barkow makes in *Prisoners of Politics* as applied to the federal criminal justice system. Sure, we need expertise in order to make data-driven criminal justice policy decisions—as Barkow puts it, “[t]he key is to create and foster an institutional framework that prioritizes data” and “expertise” so as to “create incentives for key decisionmakers to be accountable for real results” (pp. 14–15). But in creating reforms, the *kind* of expertise is also important. Many federal policymakers currently view the DOJ and NAAUSA as possessing the most salient expertise on all criminal justice matters. This Review, I hope, calls that premise into serious doubt.

In Part I of this Review, I explain how the DOJ and NAAUSA have had a vise-like grip on federal policymakers when deciding criminal justice issues. In Part II, I detail their lobbying efforts in favor of longer sentences and against any reforms that would reduce sentences, and I explain why their claims against reform are flawed. Part III addresses the DOJ’s and the NAAUSA’s active opposition to criminal justice policies set by the presidents whom they serve because federal prosecutors seek to retain power to the exclusion of all other policy goals.

If we want a federal criminal justice system that reflects the goals of public safety, fairness, and equal enforcement, then federal policymakers should give less deference to the views of federal prosecutors because they do not possess the requisite expertise or will to move our policies toward those ends.

#### I. THE DEPARTMENT OF JUSTICE AND THE NATIONAL ASSOCIATION OF ASSISTANT U.S. ATTORNEYS HAVE ENORMOUS LOBBYING POWER IN WASHINGTON, D.C.

As I quickly found out in the halls of Congress while advocating for the First Step Act,<sup>14</sup> sometimes the correct policy answers for federal reform don’t matter to policymakers, even if those policy answers would make the public safer and the justice system more equitable. Policymakers are not always persuaded by the best public policy positions because they don’t want

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12. See Shon Hopwood, *Improving Federal Sentencing*, 87 UMKC L. REV. 79, 83–84 (2018).

13. See *Past Inmate Population Totals*, FED. BUREAU PRISONS, [https://www.bop.gov/about/statistics/population\\_statistics.jsp](https://www.bop.gov/about/statistics/population_statistics.jsp) [<https://perma.cc/3VFJ-M8ZP>] (listing federal prison population as 24,640 in 1980 and 176,932 as of November 21, 2019).

14. I informally advised congressional members and the White House’s Office of American Innovation when the First Step Act was negotiated and voted on in Congress during the summer and fall in 2018. See Karen Sloan, *Bank-Robber-Turned-Law-Prof Lands a Starring Role in Criminal Justice Reform*, LAW.COM (Apr. 2, 2019, 2:14 PM), <https://www.law.com/2019/04/02/bank-robber-turned-law-prof-lands-a-starring-role-in-criminal-justice-reform/> (on file with the *Michigan Law Review*).

to appear soft on crime or have a Willie Horton moment like Michael Dukakis did in his presidential race against George H.W. Bush in 1988.<sup>15</sup> Horton was a state prisoner in Massachusetts who absconded from a furlough program. A year later, he raped a woman and assaulted her boyfriend. Although the furlough program had a 99 percent success rate, Bush used Horton's example and Massachusetts Governor Dukakis's support for the program in attack ads.<sup>16</sup> As Professor John Pfaff has explained, criminal justice policy is a "low-information, high-salience" issue, meaning voters don't pay attention to mundane criminal justice issues but mostly respond to shocking events, such as Horton's crime.<sup>17</sup> The Horton ads contributed to Dukakis's loss in 1988, and ever since, policymakers have realized that "[e]ven smart leniency is politically costly, but severity is not."<sup>18</sup>

Because congressional members are concerned about appearing soft on crime, they are much less likely to vote for criminal justice reform bills without political cover from law enforcement groups, which are thought to possess the most salient expertise on criminal justice matters. Political cover was necessary during the Senate negotiations leading up to a vote on the First Step Act, a bill mostly designed to reform the federal prison system. Despite the fact that police and prosecutors have no expertise on corrections policy,<sup>19</sup> it took support from the National Fraternal Order of Police (FOP)—and feigned silence rather than open opposition from the DOJ—before Senator McConnell called the First Step Act for a floor vote and members in the Senate felt comfortable voting for a modest reform bill.<sup>20</sup> But even though the First Step Act's passage was a win for criminal justice reform and sound public policy, the FOP endorsement came at a huge cost. In return for FOP's support, lawmakers decided against making many of the First Step Act's sentencing provisions retroactively applicable to people currently in federal

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15. See Peter Baker, *Bush Made Willie Horton an Issue in 1988, and the Racial Scars Are Still Fresh*, N.Y. TIMES (Dec. 3, 2018), <https://www.nytimes.com/2018/12/03/us/politics/bush-willie-horton.html> [https://perma.cc/YP4T-R29E]. Professor Barkow also recounts this story in *Prisoners of Politics*. P. 6.

16. P. 6; see Rachel Withers, *George H.W. Bush's "Willie Horton" Ad Will Always Be the Reference Point for Dog-Whistle Racism*, VOX (Dec. 1, 2018, 4:10 PM), <https://www.vox.com/2018/12/1/18121221/george-hw-bush-willie-horton-dog-whistle-politics> [https://perma.cc/47KQ-GP47].

17. PFAFF, *supra* note 1, at 169–70.

18. John Pfaff, *Op-ed: The Never-Ending 'Willie Horton Effect' Is Keeping Prisons Too Full for America's Good*, L.A. TIMES (May 14, 2017, 4:00 AM), <https://www.latimes.com/opinion/op-ed/la-oe-pfaff-why-prison-reform-isnt-working-20170514-story.html> [https://perma.cc/AL44-UK66].

19. See, e.g., Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202, 203–04 (2007); Jeremy Travis et al., *Exploring the Role of the Police in Prisoner Reentry*, NEW PERSP. POLICING BULL., July 2012, at 1, 2.

20. See Editorial Board, *A Real Chance at Criminal Justice Reform*, N.Y. TIMES (Nov. 14, 2018), <https://www.nytimes.com/2018/11/14/opinion/criminal-justice-reform.html> [https://perma.cc/3PQ5-TT2L].

prison.<sup>21</sup> So while Congress determined that these sentencing provisions led to needlessly punitive and unjust sentences, it would not correct the injustices for those who had already been sentenced under them. This one example is emblematic of why large-scale reforms of the federal criminal justice system are currently impossible to obtain: law enforcement has a very effective lobbying group.

The agenda for federal policymaking is often set by interest groups lobbying the government. The DOJ is no different.<sup>22</sup> It lobbies federal policymakers in several ways. First, the DOJ has the Office of Legislative Affairs (OLA) that strategically advances its legislative initiatives.<sup>23</sup> In this role, the OLA “articulates the Department’s position on legislation proposed by Congress” and “facilitates the appearance of Department witnesses at congressional hearings.”<sup>24</sup> Second, the DOJ lobbies the White House through both letters and meetings with the goal of moving the president and his staff toward the DOJ’s desired policy outcomes. For example, when President Trump considered whether to support the inclusion of sentencing reforms in the First Step Act, the DOJ sent a letter to the White House outlining its position against the proposed bill.<sup>25</sup> Third, the DOJ sends an annual letter to the U.S. Sentencing Commission, which oversees the advisory sentencing guidelines that govern all federal sentences.<sup>26</sup> The DOJ’s efforts before the Commission include “commenting on the operation of the sentencing guidelines, suggesting changes to the guidelines that appear to be warranted, and otherwise assessing the Commission’s work.”<sup>27</sup> The DOJ also has an ex officio commissioner assigned to the Commission.<sup>28</sup>

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21. See Scott Shackford, *Top National Police Organization Declares Support for Modest Federal Sentencing Reforms*, REASON (Nov. 12, 2018, 2:05 PM), <https://reason.com/2018/11/12/top-national-police-organization-declare/> [<https://perma.cc/SK25-NSPP>].

22. See, e.g., Hopwood, *supra* note 4, at 801–03.

23. *Office of Legislative Affairs*, DEP’T OF JUST., <http://www.justice.gov/ola> [<https://perma.cc/98B8-34XK>].

24. *Id.*

25. See Charles Fain Lehman, *Exclusive: In Letter to Trump, DOJ Blasts FIRST STEP Act*, WASH. FREE BEACON (Aug. 1, 2018, 1:40 PM), <https://freebeacon.com/politics/exclusive-letter-trump-doj-blasts-first-step-act/> [<https://perma.cc/2DLQ-MTG4>].

26. See 28 U.S.C. § 994(o) (2018).

27. Letter from Jonathan J. Wroblewski, Dir., Office of Policy & Legislation, Criminal Div., U.S. Dep’t of Justice, to the Hon. Patti B. Saris, Chair, U.S. Sentencing Comm’n (July 11, 2013) (on file with the *Michigan Law Review*).

28. See *Organization*, U.S. SENTENCING COMM’N, <https://www.ussc.gov/about/who-we-are/organization> [<https://perma.cc/2K8L-9WUZ>]. Federal public defender organizations, by contrast, have no ex officio members of the Sentencing Commission. See Scott, *Gowdy Introduce Federal Defender Ex-Officio Act*, CONGRESSMAN BOBBY SCOTT (Mar. 5, 2015), <https://bobbyscott.house.gov/media-center/press-releases/scott-gowdy-introduce-federal-defender-ex-officio-act> [<https://perma.cc/52DU-QUZC>].



These methods are not the only ways that federal prosecutors lobby policymakers. The NAAUSA<sup>29</sup> has delegates in each of the ninety-three U.S. attorneys' offices, and its role is to "protect, promote, foster and advance the mission of [assistant U.S. attorneys]" in the Department of Justice and Congress.<sup>30</sup> It does so through congressional testimony, white papers, press releases, and letters to federal policymakers.<sup>31</sup> The NAAUSA often takes positions on federal criminal justice policy ranging from proposed sentencing reforms to President Obama's clemency project.<sup>32</sup>

Few lobbying groups in D.C. have as much power and influence with federal policymakers as the DOJ and the NAAUSA. Take the proliferation of substantive criminal law as one example of their lobbying prowess. The Framers viewed voluminous and unclear criminal laws as a threat to liberty,<sup>33</sup> so federal criminal law grew slowly, and by 1873 there were only 183 separate federal criminal offenses.<sup>34</sup> But the DOJ's "lobbying machine" has consistently "pushe[d] for more, broader and harsher criminal law."<sup>35</sup> As a

29. See generally Maura Ewing, *The Federal Prosecutors Backing Jeff Sessions on Mandatory Minimums*, ATLANTIC (May 22, 2017), <https://www.theatlantic.com/politics/archive/2017/05/mandatory-minimums-sessions-naa-usa-sentencing/527619/> [https://perma.cc/H4TB-9CK7] ("One such controversial voice is the National Association of Assistant United States Attorneys, a union-like organization representing a conservative bloc of AUSAs, the trial lawyers who litigate on behalf of the U.S. government in federal cases. The group has long lobbied for policies that give federal prosecutors more power in the courtroom and against reforms, like those generated under the Obama administration, to limit the use of mandatory-minimum sentences and give prosecutors more discretion, particularly with nonviolent drug offenses.").

30. *About NAAUSA*, NAAUSA, <https://www.naausa.org/site/index.php/about-naa-usa> [https://perma.cc/3F3L-S5EV].

31. See *Resources*, NAAUSA, <https://www.naausa.org/site/index.php/resources> [https://perma.cc/VB42-2CMY].

32. See, e.g., Letter from Steve Cook, President, Nat'l Ass'n of Assistant U.S. Attorneys, et al. on the Sentencing Reform and Corrections Act (Apr. 11, 2016), <https://www.naausa.org/site/index.php/resources/letters/121-apr-2016-coalition-letter-on-srca-revisions/file> [https://perma.cc/DJ9G-YC79]; Letter from Steven Cook, President, Nat'l Ass'n of Assistant U.S. Attorneys, to the President (Dec. 22, 2015), <https://www.naausa.org/site/index.php/resources/letters/37-dec-2015-letter-on-clemency-to-president-ag/file> [https://perma.cc/J9LS-23EJ].

33. See THE FEDERALIST NO. 62, at 335 (James Madison) (Clinton Rossiter ed., 1961) ("It will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow.").

34. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 514 (2001).

35. David B. Smith, *Re-Examining Our Criminal Laws*, CHAMPION, July 2004, at 42; see also Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 272–73 (2013) ("And [federal] prosecutors have often been a driving force in the political arena for mandatory minimum sentences and new federal criminal laws.").

result, we now live in the era of congressional crime creation.<sup>36</sup> Today, there are approximately 4,500 federal statutes and hundreds of thousands of federal regulations carrying criminal penalties.<sup>37</sup> From 2000 to 2007 alone, Congress created 452 new federal crimes,<sup>38</sup> and from 2008 to 2013, Congress added 439 new offenses.<sup>39</sup> Federal prosecutors are so proficient in moving the Congress to pass criminal laws that there is a Twitter handle to document all the crimes.<sup>40</sup> The “A Crime a Day” Twitter account noted in 2015 that it “will have tweeted a federal crime every day for a year. By some estimates, it will only take ~800 years to tweet the rest.”<sup>41</sup> The DOJ has thus been quite effective in moving Congress to enact more and more federal crimes.<sup>42</sup>

Congressional overrides of Supreme Court decisions are another marker of federal prosecutors’ influence over the legislative process. An override occurs when Congress passes a statute that overrules or modifies a Supreme Court statutory interpretation decision.<sup>43</sup> Professors Matthew Christiansen and William Eskridge conducted a study finding 286 congressional overrides of Supreme Court decisions from 1967 to 2011.<sup>44</sup> Even though congressional overrides involve a nearly limitless number of topics on which Congress leg-

36. See Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695 (2017). See generally HARVEY A. SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (2009).

37. See BAKER, *supra* note 11, at 1, 4.

38. *Id.* at 1 (finding that from 2000 through 2007, Congress enacted an average of 56.5 crimes a year).

39. Memorandum from Alison M. Smith, Legislative Attorney, Cong. Research Serv., and Richard M. Thompson II, Legislative Attorney, Cong. Research Serv., to Crime, Terrorism, Homeland Sec. & Investigations Subcomm. (H. Judiciary) 1 (June 23, 2014), <https://www.hsdl.org/?view&did=757175> [<https://perma.cc/277J-F9DX>] (noting that the memorandum might be underinclusive because there is no perfect way of finding and counting new federal offenses).

40. See @CrimeADay, TWITTER, <http://twitter.com/crimeaday> [<https://perma.cc/3BZM-9KRM>].

41. @CrimeADay, TWITTER (July 17, 2015, 12:01 PM), <https://twitter.com/CrimeADay/status/622073623013146624> [<https://perma.cc/S2BQ-PG97>].

42. See Peter J. Henning, *Targeting Legal Advice*, 54 AM. U. L. REV. 669, 670–71 (2005) (noting that the DOJ “has been quite effective in getting Congress to approve legislation enacting broader crimes and—at least until recently—in shifting much of the power to set sentences to federal prosecutors”).

43. Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1319 (2014) (describing an override as when Congress passes a law that: “(1) completely overrules the holding of a statutory interpretation decision, just as a subsequent Court would overrule an unsatisfactory precedent,” or “(2) modifies the result of a decision in some material way, such that the same case would have been decided differently,” or “(3) modifies the consequences of the decision, such that the same case would have been decided in the same way but subsequent cases would be decided differently” (quoting William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 332 n.1 (1991))).

44. Christiansen & Eskridge, *supra* note 43, at 1329.

islates, criminal law accounted for almost thirteen percent of the total overrides, making this category “among the largest producers of overrides.”<sup>45</sup> Those criminal law–related overrides, the authors noted, were “decidedly one-sided,” because “[i]f the Department of Justice believes the Court’s stingy interpretation of a criminal prohibition, penalty, or procedural rule stands in the way of effective implementation of a criminal law regime, it can typically gain the attention of Congress and can often secure an override.”<sup>46</sup> As a consequence, there was a proliferation of DOJ-initiated overrides “further penalizing [criminal defendants] and virtually no overrides protecting them.”<sup>47</sup>

The DOJ’s and the NAAUSA’s views are carefully listened to by federal policymakers and, in the following Sections, I argue that their views are often based on flawed data and a not-so-secret attempt to maintain power at all costs.

## II. THE DEPARTMENT OF JUSTICE AND FEDERAL PROSECUTORS OFTEN LOBBY AGAINST ANY REFORMS THAT REDUCE SENTENCES

In her book, Professor Barkow observes that “prosecutors are often key lobbyists for getting laws and guidelines with longer sentences passed” (p. 51). That has certainly been the case for federal prosecutors, who continue to lobby for longer sentences and who oppose even modest reductions of federal sentencing provisions. In this Section, I explain the DOJ’s and the NAAUSA’s misguided views on mandatory minimum sentencing provisions and retroactively applicable reductions of the U.S. Sentencing Guidelines.

Federal prosecutors have long argued that longer mandatory minimum punishments are indispensable in deterring people from committing crimes and are needed as leverage to persuade defendants to cooperate and plead guilty. In a 1993 article in the *Los Angeles Times*, then–Attorney General William Barr said of mandatory minimums, “The only way to get a real hammer effect on some crimes is to set a floor below which the judge cannot

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45. *Id.* at 1361.

46. *Id.* at 1383.

47. *Id.* The First Step Act is the only example I can think of where Congress overrode a Supreme Court decision favoring the government and not criminal defendants. The First Step Act overrode the Supreme Court’s decision in *Barber v. Thomas*, 560 U.S. 474 (2010), where the Court held that the BOP had properly interpreted the federal good-time credits statute by proportionally calculating the fifty-four days of good-time credits for each year of the prisoner’s term of imprisonment. That interpretation meant that federal prisoners only received forty-seven days of good-time credits per year, even though the statute said prisoners were to receive up to fifty-four days a year. The First Step Act restored Congress’s original intent and prisoners now receive fifty-four days of good-time credits. See First Step Act of 2018, Pub. L. No. 155-391, § 102(b), 132 Stat. 5194, 5210; see also Scott Shackford, *Thousands Freed from Federal Prison by FIRST STEP Act Reforms*, REASON (July 19, 2019, 2:10 PM), <https://reason.com/2019/07/19/thousands-freed-from-federal-prison-by-first-step-act-reforms/> [https://perma.cc/N3BM-MDCY].

go.”<sup>48</sup> Since then, not much has changed. In 2014, several former federal prosecutors, including Barr, sent a letter to the U.S. Senate arguing that lowering some mandatory minimum provisions “will make it harder for prosecutors to build cases against the leaders of narcotics organizations and gangs.”<sup>49</sup> In 2016, the NAAUSA similarly sent a letter opposing the Sentencing Reform Act of 2015 to members of the House of Representatives, claiming that mandatory minimum and other sentencing provisions helped reduce violent crime by half.<sup>50</sup> In 2017, the NAAUSA and other law enforcement organizations also opposed the Sentencing Reform and Corrections Act, claiming that the legislation would undermine mandatory minimum penalties for drug crimes and would “make it more difficult for law enforcement to pursue the most culpable drug dealers and secure their cooperation to pursue others.”<sup>51</sup>

The DOJ continues to lobby in favor of mandatory minimum punishments. Just last year, the DOJ advocated in favor of Senate Bill 2635, called the “Ending the Fentanyl Crisis Act of 2018.”<sup>52</sup> This bill would have reduced the threshold quantity of fentanyl necessary to trigger steep mandatory minimum penalties.<sup>53</sup> The DOJ argued that the current quantity threshold and punishments were an “inadequate deterrent.”<sup>54</sup> It further argued that the quantity threshold for fentanyl was not consistent with heroin, resulting in the “perverse effect of encouraging drug traffickers to substitute fentanyl for heroin.”<sup>55</sup>

Putting aside that stiff mandatory minimum punishments have yet to create success in reducing the trafficking and use of illegal drugs (as the opi-

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48. Jim Newton, *Judges Voice Anger over Mandatory U.S. Sentences*, L.A. TIMES (Aug. 21, 1993, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1993-08-21-mn-26014-story.html> [<https://perma.cc/W7VQ-UDEM>].

49. Letter from William P. Barr, Former U.S. Attorney Gen., et al. to Harry Reid, Majority Leader, U.S. Senate, and Mitch McConnell, Minority Leader, U.S. Senate (May 12, 2014), <https://www.naaua.org/site/index.php/resources/letters/57-may-2014-letter-opposing-mandatory-minimums-reduction/file> [<https://perma.cc/NH4F-DR8K>].

50. Letter from Steven H. Cook, President, Nat’l Ass’n of Assistant U.S. Attorneys, to Members of the House of Representatives (Sept. 8, 2016), <https://www.naaua.org/site/index.php/resources/letters/130-sep-2016-letter-opposing-srca-2015/file> [<https://perma.cc/4VV8-2EED>].

51. Letter from Lawrence Leiser, Nat’l Ass’n of Assistant U.S. Attorneys, et al. to Charles E. Grassley, Chair, Comm. on the Judiciary, U.S. Senate, and Dianne Feinstein, Ranking Member, Comm. on the Judiciary, U.S. Senate (Nov. 2, 2017), <https://assets.documentcloud.org/documents/4175976/LE-Groups-Ltr-Re-S-1917-Nov02-2017.pdf> [<https://perma.cc/AE33-JSCH>].

52. Letter from Prim F. Escalona, Principal Deputy Assistant Attorney Gen., to Lindsey Graham, Chairman, Subcomm. on Crime & Terrorism, U.S. Senate, and Tom Cotton, U.S. Senate (May 11, 2018) (on file with the *Michigan Law Review*).

53. Ending the Fentanyl Crisis Act of 2018, S. 2635, 115th Cong.

54. Letter from Prim F. Escalona to Lindsey Graham and Tom Cotton, *supra* note 52, at 2.

55. *Id.*

oid crisis shows),<sup>56</sup> many of these claims by federal prosecutors are contrary to the opinions of experts in the field. To begin with, the claim that rising incarceration rates were the dominant driver of the American crime decline is against the weight of views from criminologists and economists. Experts believe that the link between higher incarceration and lower crime rates is not nearly as strong as previously thought.<sup>57</sup> Because there were many variables that led to the crime decline, criminologists now believe that increased incarceration had no “statistically significant effect” on reducing violent crime in the 1990s and the 2000s.<sup>58</sup> After replicating several “high-credibility” studies on whether incarceration reduces crime, one notable economist concluded that “the best estimate of the impact of additional incarceration on crime in the United States today is zero.”<sup>59</sup> These experts’ views are borne out by recent data. Between 2007 and 2017, thirty-four states reduced both their crime rates and their prison populations.<sup>60</sup> But it is not surprising that federal prosecutors believe that *their* efforts have led to a dramatic reduction in crime. In *Prisoners of Politics*, Professor Barkow explains that while prosecutors “often believe they are experts in public safety, they are not criminologists or social scientists who study these issues on a regular basis. When they decide policy questions, it tends to be from their own experience as prosecutors, uninformed by broader data or empirical analysis” (p. 166).

Nor are federal prosecutors’ claims about the general deterrent effect of mandatory minimums and other harsh sentencing provisions accurate.

56. Arthur C. Evans, Jr., *We Cannot Arrest Our Way out of America’s Opioid Crisis*, AM. PSYCHOL. ASS’N (June 2018), <https://www.apa.org/monitor/2018/06/ceo> [https://perma.cc/Z25K-N2DQ] (“We have tried before to arrest our way out of a drug crisis—it didn’t work then and it won’t work now. Addiction is an illness. Let’s focus less on punishment and more on treating those who need our help.”); see Barry R. Grissom, *Mandatory Minimums: The Wrong Strategy for the Opioid Epidemic*, HILL (Nov. 9, 2017, 2:42 PM), <https://thehill.com/opinion/criminal-justice/359661-mandatory-minimums-the-wrong-strategy-for-the-opioid-epidemic> [https://perma.cc/2GVG-YKBN] (“There are no easy solutions to the opioid crisis. But we have to be willing to accept what hasn’t worked. Too much money on incarceration and not enough money on public health has been a recipe for disaster in our communities. A fresh approach with the right focus is the way ahead.”).

57. See DON STEMEN, VERA INST. OF JUSTICE, *THE PRISON PARADOX: MORE INCARCERATION WILL NOT MAKE US SAFER* 1–2 (2017); Rucker Johnson & Steven Raphael, *How Much Crime Reduction Does the Marginal Prisoner Buy?*, 55 J.L. & ECON. 275, 302 (2012) (noting that incarceration reduced more crime from 1978 to 1990, but that the effect of the incarceration rate on the crime rate was much smaller between 1991 and 2004).

58. See, e.g., OLIVER ROEDER ET AL., BRENNAN CTR. FOR JUSTICE, *WHAT CAUSED THE CRIME DECLINE?* 22 (2015).

59. DAVID ROODMAN, OPEN PHILANTHROPY PROJECT, *THE IMPACTS OF INCARCERATION ON CRIME* 7 (2017) (emphasis omitted).

60. Cameron Kimble & Ames Grawert, *Between 2007 and 2017, 34 States Reduced Crime and Incarceration in Tandem*, BRENNAN CTR. FOR JUST. (Aug. 6, 2019), <https://www.brennancenter.org/blog/between-2007-and-2017-34-states-reduced-crime-and-incarceration-tandem> [https://perma.cc/DVH5-P9Z8] (“The data clearly demonstrate that the United States’ prison population can be reduced without sacrificing the public safety gains of recent decades.”).

Many people who commit crimes—young men, people in the throes of drug or alcohol addiction, or those suffering from mental illness—don’t act rationally.<sup>61</sup> Even if they did, deterrence only works if people understand the consequences. Not surprisingly, the public grossly underestimates the harshness of American sentences.<sup>62</sup> And behavioral economics suggests that people don’t properly estimate unlikely-but-severe outcomes, which means that a ten-year prison sentence won’t have much more of a deterrent effect than a five-year sentence.<sup>63</sup> Indeed, a report commissioned by the DOJ concluded that lengthy prison sentences are not the best way to deter future crimes.<sup>64</sup> Instead, it is the certainty of getting caught, not the severity of the punishment, that provides the most deterrent benefits.<sup>65</sup>

The claims about the necessity of mandatory minimums are also contrary to the goal of public safety.<sup>66</sup> The U.S. Sentencing Commission concluded that mandatory minimum penalties contributed to the rise of the federal prison population,<sup>67</sup> which has risen so much that the Federal Bureau of

61. See Adam Gelb et al., *More Imprisonment Does Not Reduce State Drug Problems*, PEW (Mar. 8, 2018), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/03/more-imprisonment-does-not-reduce-state-drug-problems> [https://perma.cc/C4RZ-TRWA] (“If imprisonment were an effective deterrent to drug use and crime, then, all other things being equal, the extent to which a state sends drug offenders to prison should be correlated with certain drug-related problems in that state. The theory of deterrence would suggest, for instance, that states with higher rates of drug imprisonment would experience lower rates of drug use among their residents. To test this, Pew compared state drug imprisonment rates with three important measures of drug problems—self-reported drug use (excluding marijuana), drug arrest, and overdose death—and found no statistically significant relationship between drug imprisonment and these indicators. In other words, higher rates of drug imprisonment did not translate into lower rates of drug use, arrests, or overdose deaths.”); see also Ricardo Caceda et al., *Toward an Understanding of Decision Making in Severe Mental Illness*, J. NEUROPSYCHIATRY & CLINICAL NEUROSCIENCES, Summer 2014, at 196; Alexandra Sifferlin, *Why Teenage Brains Are So Hard to Understand*, TIME (Sept. 8, 2017), <https://time.com/4929170/inside-teen-teenage-brain/> [https://perma.cc/AL27-D8JU].

62. See Francis T. Cullen et al., *Public Opinion About Punishment and Corrections*, 27 CRIME & JUST. 1, 3 (2000).

63. See VALERIE WRIGHT, SENTENCING PROJECT, DETERRENCE IN CRIMINAL JUSTICE 4–5 (2010).

64. See NAT’L RESEARCH COUNCIL, *supra* note 1, at 155–56.

65. P. 17 (“The criminology research is clear that would-be offenders are deterred when they believe they will be caught, and the odds of detection matter far more than possible prison sentences in the decision whether to commit a crime.”); Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both Be Reduced?*, 10 CRIMINOLOGY & PUB. POL’Y 13, 13–14 (2011); Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 206 (2013).

66. P. 7 (“Prosecutors typically claim they are the guardians of public safety when they advocate for longer sentences to stay on the books, even though longer sentences are not always best for public safety.”).

67. See U.S. SENTENCING COMM’N, AN OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 48–49 (2017) (noting that, at the end of the 2016 fiscal year, over 55 percent of people in BOP custody were convicted of an offense carrying a mandatory minimum penalty).

Prisons' (BOP) detention costs now account for "roughly one third" of the DOJ's overall budget.<sup>68</sup> That result "comes with significant public safety consequences" because the growing BOP budget has "crowd[ed] out" other policy priorities at the DOJ.<sup>69</sup> If federal prosecutors were really concerned with deterring crime and saving their precious resources, they would advocate for sentencing reforms designed to significantly reduce the federal prison population.<sup>70</sup> The DOJ could then reallocate the resources spent on incarcerating people for the hiring of additional law enforcement officers and prosecutors, who could solve and prosecute more crimes, thus increasing the likelihood of being caught and deterring more people from committing crimes.

One claim federal prosecutors frequently employ is that any reduction in mandatory minimum punishments will lead to less cooperation and fewer guilty pleas, thereby stymieing their efforts to prosecute drug crimes.<sup>71</sup> When Attorney General Eric Holder instructed federal prosecutors not to charge offenses carrying mandatory minimum penalties in drug cases, there were fears that prosecutors would lose their leverage.<sup>72</sup> The rate of guilty pleas, however, stayed exactly the same as it was before the new DOJ policy.<sup>73</sup> After Congress passed the Fair Sentencing Act of 2010,<sup>74</sup> a bill that increased the threshold quantity of crack cocaine corresponding to mandatory minimum penalties, federal cases were adjudicated by guilty plea at a rate of 97 per-

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68. Sally Q. Yates, Deputy Attorney Gen., U.S. Dep't of Justice, McNamara Memorial Lecture at Fordham University (Nov. 14, 2016), <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-mcnamara-memorial-lecture-fordham> [<https://perma.cc/6GKK-WRNB>]; see also Eric H. Holder Jr., Opinion, *Eric Holder: We Can Have Shorter Sentences and Less Crime*, N.Y. TIMES (Aug. 11, 2016), <https://www.nytimes.com/2016/08/14/opinion/sunday/eric-h-holder-mandatory-minimum-sentences-full-of-errors.html> [<https://perma.cc/85G7-85XM>] ("About a third of the Justice Department's budget now goes to the Bureau of Prisons—and in the absence of change, that proportion will grow.").

69. Yates, *supra* note 68.

70. See PEW CTR. ON THE STATES, TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISON TERMS 35–38 (2012) (arguing that "thousands could serve shorter [prison] terms without impacting public safety" (cleaned up)).

71. Evan McMorris-Santoro, *Justice Department: You Don't Need Mandatory Prison Sentences to Put the Right Drug Criminals in Jail*, BUZZFEED NEWS (July 22, 2015, 10:16 AM), <https://www.buzzfeednews.com/article/evanmcsan/the-justice-department-you-dont-need-mandatory-prison-senten> [<https://perma.cc/YX88-P52B>] ("The central argument against the sweeping changes to the war on drugs proposed by the Obama administration and others goes like this: If you take away stringent mandatory minimum sentences for drug crimes, prosecutors can no longer use the fear of prison to flip drug criminals. If they can't flip drug criminals, they can't go after more powerful and dangerous drug criminals. And if they can't go after those criminals, they can't hope to make a dent in the illegal drug trade.").

72. *Id.* (quoting Deputy Attorney General Sally Yates).

73. *Id.* (quoting Deputy Attorney General Sally Yates).

74. See Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified as amended in scattered sections of title 21).

cent.<sup>75</sup> And even if it were true that federal prosecutors would have difficulty securing guilty pleas and cooperation without mandatory minimums, that single factor is not a reasonable basis upon which to set all federal sentencing law policy. Congress has never stated that the goal of federal sentencing is to make federal prosecutors' jobs easier.<sup>76</sup> If that were the only goal of reforming the criminal justice system, then we should also abolish the jury trial, the right to counsel and to confront one's accusers, and many other protections the Framers enshrined in the Bill of Rights precisely to make it more difficult for the federal government to charge and incarcerate large numbers of people.

Federal prosecutors have additionally opposed retroactive sentencing guidelines changes that reduce punishments. When the U.S. Sentencing Commission considered broad retroactive application of the Amendment 728 "drugs minus two" provision,<sup>77</sup> the deputy attorney general (DAG) testified in favor of only "limited retroactivity of the pending drug guideline amendments."<sup>78</sup> The DAG asked for limited application of the new sentencing rule because of "public safety concerns that arise from the release of dangerous drug offenders, and from the diversion of resources necessary to process over 50,000 inmates."<sup>79</sup> Once again, the DOJ's arguments prioritized the workload of federal prosecutors to the exclusion of all other policy goals, such as fairness and public safety.

The U.S. Sentencing Commission ultimately made Amendment 728 broadly applicable,<sup>80</sup> bringing prisoners' sentences in line with current law and providing a measure of fairness to the system. The DOJ's claims about releasing "dangerous drug offenders" also proved to be wrong. The U.S. Sentencing Commission later issued a report stating that those released under Amendment 728 recidivated at the same rate as those who had served their

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75. U.S. SENTENCING COMM'N, *FEDERAL SENTENCING: THE BASICS* 5 (2018) ("In recent years, 97 percent of federal defendants convicted of a felony or Class A misdemeanor offense are adjudicated guilty based on a guilty plea rather than on a verdict at a trial.").

76. See generally 18 U.S.C. § 3553(a)(2)(A)–(D) (2018) (listing the goals of sentencing as, for example, the need to reflect the seriousness of the offense, to promote respect for the law, to impose just punishment, to afford adequate deterrence, and to protect the public from further crimes of the defendant).

77. See Christopher Zoukis, *Drugs Minus Two FAQ: Everything You Need to Know About Amendment 782*, HUFFPOST (Sept. 16, 2014, 6:21 PM) (updated Dec. 6, 2017), [https://www.huffingtonpost.com/christopher-zoukis/drugs-minus-two-faq-every\\_b\\_5831876.html](https://www.huffingtonpost.com/christopher-zoukis/drugs-minus-two-faq-every_b_5831876.html) [<https://perma.cc/5HPB-95E5>] (explaining that the U.S. Sentencing Commission adjusted its Drug Quantity Table downward by two levels under Amendment 728).

78. *Public Hearing on Retroactivity of 2014 Drug Amendment Before the U.S. Sentencing Comm'n* 105 (June 10, 2014), [https://www.ussc.gov/sites/default/files/transcript\\_1.pdf](https://www.ussc.gov/sites/default/files/transcript_1.pdf) [<https://perma.cc/VR9A-6WB6>] (statement of Sally Q. Yates, U.S. Attorney).

79. *Id.* at 110–11.

80. See U.S. SENTENCING COMM'N, *GUIDELINES MANUAL* app. C supp., amend. 782 (2014).



full sentences before the law was made retroactively applicable.<sup>81</sup> Although federal prosecutors like to employ the scare tactic of highlighting that reforms will lead to the release of dangerous prisoners, what they often fail to explain is that an overwhelming majority of people serving time in federal prison will one day be released regardless. And despite a growing consensus among experts that the longer someone spends in a correctional setting, the higher their risk of recidivism upon release,<sup>82</sup> federal prosecutors are not lobbying for those in federal prison to receive more recidivism-reducing programs to assist those reentering society from reoffending. As Professor Barkow notes, “[i]f prosecutors cared mainly about public safety instead of what made their professional life easier, they would be just as vocal about other issues that affect the successful reentry or reform of individuals who have committed crimes” (p. 7).

### III. THE DEPARTMENT OF JUSTICE ATTEMPTS TO THWART THE PRESIDENT’S CRIMINAL JUSTICE POLICY POSITIONS WHEN THEY RUN COUNTER TO ITS OWN POLICY PREFERENCES

It is one thing for federal prosecutors in the executive branch to lobby against reforms in Congress and the Sentencing Commission, but it is something altogether different when they attempt to thwart the policy agenda of the president they serve. Yet that is exactly what occurred when President Trump made it a priority to pass bipartisan criminal justice reform through the First Step Act and when President Obama tried to implement new clemency policies.

In October of 2017, Senators Chuck Grassley and Dick Durbin introduced the Sentencing and Corrections Reform Act (which the First Step Act later supplanted) in the Senate.<sup>83</sup> By January of 2018, President Trump sig-

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81. See U.S. SENTENCING COMM’N, *RECIDIVISM AMONG FEDERAL OFFENDERS RECEIVING RETROACTIVE SENTENCE REDUCTIONS: THE 2011 FAIR SENTENCING ACT GUIDELINE AMENDMENT 1* (2018) (“The Commission finds no difference between the recidivism rates for offenders who were released early due to retroactive application of the FSA Guideline Amendment and offenders who had served their full sentences before the FSA Guideline Amendment reduction retroactively took effect.”).

82. See EXEC. OFFICE OF THE PRESIDENT OF THE U.S., *ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM* 39 (2016) (“[A] growing body of work has found that incarceration increases recidivism.”); Cassia Spohn & David Holleran, *The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders*, 40 *CRIMINOLOGY* 329, 348 (2002) (finding that individuals sentenced to prison had higher recidivism rates and recidivated more quickly than individuals sentenced to probation); Lynne M. Vieraitis et al., *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data, 1974–2002*, 6 *CRIMINOLOGY & PUB. POL’Y* 589 (2007) (finding that increased prison releases are associated with higher crime rates and arguing that this is due to the criminogenic effects of prison).

83. See Seung Min Kim, *Senators Unveil Bipartisan Criminal Justice Reform Package*, POLITICO (Oct. 4, 2017, 3:10 PM), <https://www.politico.com/story/2017/10/04/senate-bipartisan-bill-criminal-justice-reform-243455> [<https://perma.cc/9BDG-CMAX>].

naled support for the bill.<sup>84</sup> Just a few weeks later, Attorney General Jeff Sessions undermined that effort by sending Senator Grassley a letter stating that if the bill passed in its current form, “this legislation would be a grave error.”<sup>85</sup> After the House of Representatives voted in favor of the First Step Act in May of 2018, and despite the White House’s continued support for the bill, the attorney general claimed the legislation would “just create new victims” and then threw “his weight behind legislation to toughen and lengthen prison sentences.”<sup>86</sup>

Even though it’s the president’s right to set policy priorities for the executive branch, Attorney General Sessions and the DOJ continued to oppose the White House’s desire to pass criminal justice reform.<sup>87</sup> In July of 2018, the DOJ’s Office of Legislative Affairs sent a letter to the White House lambasting the First Step Act, claiming that it would “significantly erode” the “long established truth-in-sentencing principles, create impossible administrative burdens, effectively reduce the sentences of thousands of violent felons, and endanger the safety of law-abiding citizens and law enforcement officers.”<sup>88</sup>

The DOJ’s letter was full of inaccuracies. Because Attorney General Eric Holder’s new policies had led to shorter federal sentences and a slightly

84. See *Remarks by President Trump in a Meeting on Prison Reform*, WHITE HOUSE (Jan. 11, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-meeting-prison-reform/> [<https://perma.cc/Y9QN-GDNC>].

85. Letter from Jeff Sessions, Attorney Gen., to Charles Grassley, Chairman, Comm. on the Judiciary, U.S. Senate (Feb. 14, 2018), <https://www.politico.com/f/?id=00000161-966d-da6b-ade9-fefd38e20001> [<https://perma.cc/6VMA-S2BQ>]; see also Elana Schor, *Grassley Rips Sessions for Opposing Criminal Justice Bill*, POLITICO (Feb. 14, 2018, 6:05 PM), <https://www.politico.com/story/2018/02/14/grassley-sessions-criminal-justice-410735> [<https://perma.cc/3428-599R>].

86. See Tony Pugh, *Trump, Sessions Feud Spills Over into Dispute over Policy on Criminal Justice Reform*, MCCLATCHY (Aug. 21, 2018, 3:14 PM), <https://www.mcclatchydc.com/news/politics-government/white-house/article217065005.html> (on file with the *Michigan Law Review*).

87. See Sarah N. Lynch, *Senators Seek Trump Backing for Prison Sentencing Reform Bill*, REUTERS (June 26, 2018, 3:09 PM), <https://www.reuters.com/article/us-usa-congress-sentencing-reform/senators-seek-trump-backing-for-prison-sentencing-reform-bill-idUSKBN1JM2OA> [<https://perma.cc/HL84-SUNS>] (“A bipartisan pair of U.S. Senators on Tuesday called on President Donald Trump to back a bill that would reduce prison sentences for non-violent offenders, despite staunch opposition by Attorney General Jeff Sessions.”); Sophie Tatum et al., *Criminal Justice Overhaul Is Tabled—For Now*, CNN (Aug. 23, 2018, 10:49 PM), <https://www.cnn.com/2018/08/23/politics/criminal-justice-reform-white-house-donald-trump-jeff-sessions/index.html> [<https://perma.cc/3DVE-ES22>] (“‘We’re pleased the President agreed that we shouldn’t support criminal justice reform that would reduce sentences, put drug traffickers back on our streets and undermine our law enforcement officers who are working night and day to reduce violent crime and drug trafficking in the middle of an opioid crisis,’ Justice Department spokeswoman Sarah Isgur Flores said in a statement.”).

88. Letter from Stephen E. Boyd, Assistant Attorney Gen., to Marc Short, Assistant to the President (July 12, 2018), [https://freebeacon.com/wp-content/uploads/2018/08/DOJ\\_Letter\\_Beacon.pdf](https://freebeacon.com/wp-content/uploads/2018/08/DOJ_Letter_Beacon.pdf) [<https://perma.cc/43EB-NYER>]; see also Lehman, *supra* note 25.

smaller federal prison population,<sup>89</sup> the DOJ argued that “[i]t is likely no coincidence that, at the same time, we are in the midst of the largest drug crisis in our nation’s history and recently experienced the two largest single-year increases in the national violent crime rate in a quarter of a century.”<sup>90</sup> But, as others noted, “correlation doesn’t mean causation,”<sup>91</sup> especially given that violent crime prosecutions make up a small fraction of total federal sentences.<sup>92</sup> Indeed, former FBI Director James Comey attributed the 2015 increase in homicides in several American cities to less aggressive policing—not slightly smaller federal sentences and a minor reduction in the federal prison population.<sup>93</sup> The numbers show that the DOJ’s claim that the violent crime rate had experienced historically large increases in 2015 and 2016 was also disingenuous.<sup>94</sup> Sure, the FBI’s Uniform Crime Report found an increase in violent crime in 2015 and 2016.<sup>95</sup> But when the Bureau of Justice Statistics released the results of its National Crime Victim Survey, it showed that though the numbers demonstrated no significant change, the rate of violent crime dropped from 20.1 per 1,000 in 2014 to 18.6 per 1,000 in 2015.<sup>96</sup> And the DOJ’s letter failed to convey the most important point: that the National Crime Victim Survey and the FBI’s Uniform Crime Report “both show that crime in the United States remains at its lowest levels in decades.”<sup>97</sup>

The DOJ further argued that the First Step Act’s earned-time provision would “effectively function as a blanket, one-third reduction in the amount

89. Letter from Stephen E. Boyd to Marc Short, *supra* note 88, at 1.

90. *Id.*

91. Sarah Anderson, *DOJ Overtly Attempts to Undermine President Trump’s Prison Reform Agenda*, FREEDOM WORKS (Aug. 1, 2018), [www.freedomworks.org/content/doj-overtly-attempts-undermine-president-trumps-prison-reform-agenda](http://www.freedomworks.org/content/doj-overtly-attempts-undermine-president-trumps-prison-reform-agenda) [https://perma.cc/8NQR-P8E8].

92. See U.S. SENTENCING COMM’N, 2017 FEDERAL SENTENCING STATISTICS fig. A (2018), <https://www.ussc.gov/research/data-reports/geography/2017-federal-sentencing-statistics> [https://perma.cc/2VNJ-8GHT] (showing that federal drug, immigration, and white collar offenses constituted over 72 percent of federal sentences).

93. Eric Lichtblau & Monica Davey, *Homicide Rates Jump in Many Major U.S. Cities, New Data Shows*, N.Y. TIMES (May 13, 2016), <https://www.nytimes.com/2016/05/14/us/murder-rates-cities-fbi.html> [https://perma.cc/YG4F-CV86].

94. See Editorial Board, *False Alarms About a National Crime Wave*, N.Y. TIMES (Nov. 27, 2015), <https://www.nytimes.com/2015/11/27/opinion/false-alarms-about-a-national-crime-wave.html> [https://perma.cc/SE7D-NJYH].

95. NATHAN JAMES, CONG. RESEARCH SERV., R45236, RECENT VIOLENT CRIME TRENDS IN THE UNITED STATES 1 (2018).

96. *Criminal Victimization, 2015*, BUREAU JUST. STAT. (Oct. 20, 2016), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5804> [https://perma.cc/2ESJ-E67C].

97. Radley Balko, *More Evidence that We Aren’t in the Midst of a National Crime Wave*, WASH. POST (Oct. 20, 2016, 2:10 PM), <https://www.washingtonpost.com/news/the-watch/wp/2016/10/20/more-evidence-that-we-arent-in-the-midst-of-a-national-crime-wave/> (on file with the *Michigan Law Review*); see also JAMES, *supra* note 95, at Summary (“At the national level, violent crime and homicide rates increased from 2014 to 2015 and again from 2015 to 2016, but *both rates remain near historical lows.*” (emphasis added)).

of time that many convicted felons would spend in BOP custody.”<sup>98</sup> One could wish! Such a policy would mean everyone in federal prison would be incentivized to become rehabilitated, thus reducing their risk of recidivism upon release and making communities safer.<sup>99</sup> Unfortunately, the earned-time credits are only available to people convicted of certain offenses who, through their successful completion of recidivism-reducing programming and a DOJ-created risk assessment, establish that they are at minimum or low risk of offending.<sup>100</sup> Then, and only then, will people in federal prison receive earned-time credits that can be used to serve part of their custodial sentence in a federal halfway house or on monitored home confinement.<sup>101</sup> Given the DOJ’s long-held position that the longer the sentence the better, there is a greater risk that the DOJ will create a risk-and-needs assessment allowing too *few* in federal prison to receive earned-time credits than that it will create an assessment allowing too *many* to receive credits.<sup>102</sup>

The DOJ’s letter also made its routine pitch about reduced resources as a consequence of reform. Regarding compassionate release, it argued that the First Step Act would “require substantial expenditure” of BOP and prosecutorial resources if prisoners could file “motions for compassionate release in federal court.”<sup>103</sup> Those prosecutorial resources, however, will mostly be employed when the DOJ opposes compassionate release, and there is an easy way to save those resources—concede the release of people who meet the criteria for relief. The DOJ’s letter also fails to mention that its own inspector general issued a report finding that expanded compassionate release will save the DOJ money and help the BOP manage its prison population.<sup>104</sup>

98. Letter from Stephen E. Boyd to Marc Short, *supra* note 88, at 2 (emphasis omitted).

99. See Shon Hopwood, *Beyond First Steps: How to Reform the Federal Bureau of Prisons*, 31 FED. SENT. R. 119, 119–20 (2018).

100. See NATHAN JAMES, CONG. RESEARCH SERV., R45558, THE FIRST STEP ACT OF 2018: AN OVERVIEW 5 (2019) (“Under the act, prisoners who successfully complete recidivism reduction programming are eligible to earn up to 10 days of time credits for every 30 days of program participation. Minimum and low-risk prisoners who successfully completed recidivism reduction or productive activities and whose assessed risk of recidivism has not increased over two consecutive assessments are eligible to earn up to an additional five days of time credits for every 30 days of successful participation.”).

101. *Id.* at 5–6.

102. See Samantha Michaels, *Trump Keeps Celebrating Prison Reform. His Administration’s Latest Move Could Sabotage It*, MOTHER JONES (Apr. 11, 2019), <https://www.motherjones.com/crime-justice/2019/04/trump-first-step-act-hudson-institute-risk-assessment-committee/> [<https://perma.cc/85NG-VE3K>]; Phillip Smith, *Is the Trump Justice Department Trying to Sabotage the First Step Act?*, SALON (Apr. 28, 2019, 10:59 AM), [https://www.salon.com/2019/04/28/is-the-trump-justice-department-trying-to-sabotage-the-first-step-act\\_partner/](https://www.salon.com/2019/04/28/is-the-trump-justice-department-trying-to-sabotage-the-first-step-act_partner/) [<https://perma.cc/V386-D6BU>].

103. Letter from Stephen E. Boyd to Marc Short, *supra* note 88, at 3–4.

104. U.S. DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., THE FEDERAL BUREAU OF PRISONS’ COMPASSIONATE RELEASE PROGRAM iii (2013) (“The release of inmates through the compassionate release program provides cost savings for the BOP and assists the BOP with prison population management.” (emphasis omitted)).

The NAAUSA's opposition to the First Step Act was no better. Although federal prosecutors rarely set foot in federal prisons, the prosecutors at NAAUSA argued that "virtually all federal inmates already participate in education and training programs" and that the First Step Act "does not promise any meaningful change in inmate behavior or increase in participation in reentry programs."<sup>105</sup> I'm aware of no federal prison where virtually every prisoner has the ability to take meaningful education and training programs. And, as noted above, the only way people in federal prison receive earned-time credits is if they "successfully complete[ ] evidence-based recidivism reduction programming or productive activities."<sup>106</sup> Contrary to the NAAUSA's assertion, this requirement incentivizes people in prison to change their behavior by participating in the programs that would allow them to earn credits toward release.

By the fall of 2018, it was apparent that President Trump supported the First Step Act.<sup>107</sup> President Trump's role as chief executive should have quelled the dissension from the DOJ as to the legislation. Yet it persisted. In October of 2018, President Trump had to explain on national television that Attorney General Sessions's continued opposition to the First Step Act did not represent his administration's position, and that if the attorney general didn't support reform, "then he gets overruled by me."<sup>108</sup> Even after Sessions was ousted by President Trump, the DOJ continued to lobby Congress against the First Step Act.<sup>109</sup> At one point, the DOJ circulated a "revised ver-

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105. See Letter from Lawrence J. Leiser, President, NAAUSA, to Mitch McConnell, Majority Leader, U.S. Senate, and Chuck Schumer, Minority Leader, U.S. Senate 1 (Nov. 19, 2018), <https://www.naaua.org/site/index.php/resources/letters/157-nov-2018-letter-on-first-step-act/file> [<https://perma.cc/T32X-9HXZ>]. In my nearly ten years serving time inside a federal prison, I didn't see even half the people in prison taking educational or training programs.

106. 18 U.S.C. § 3632(d)(4)(A) (2018); see also *id.* § 3632(d) ("The System shall provide incentives and rewards for prisoners to participate in and complete evidence-based recidivism reduction programs . . .").

107. See Nicholas Fandos & Maggie Haberman, *Trump Embraces a Path to Revise U.S. Sentencing and Prison Laws*, N.Y. TIMES (Nov. 14, 2018), <https://www.nytimes.com/2018/11/14/us/politics/prison-sentencing-trump.html> [<https://perma.cc/45EP-TVSJ>] ("President Trump threw his support behind a substantial revision of the nation's prison and sentencing laws on Wednesday, opening a potential path to enacting the most significant changes to the criminal justice system in a generation.").

108. See Steven Nelson, *Trump Says He Will Overrule Jeff Sessions on Prison Reform*, WASH. EXAMINER (Oct. 11, 2018, 9:29 AM), <https://www.washingtonexaminer.com/news/white-house/trump-he-will-overrule-jeff-sessions-on-prison-reform> [<https://perma.cc/7BS2-CRJ9>].

109. See Josh Dawsey & Seung Min Kim, *Whitaker Told Trump He Has Concerns over Sentencing Reform Bill*, WASH. POST (Nov. 15, 2018), [https://www.washingtonpost.com/politics/whitaker-told-trump-he-has-concerns-over-sentencing-reform-bill/2018/11/15/bfe7e2ec-e932-11e8-bd89-ecf3b178206\\_story.html](https://www.washingtonpost.com/politics/whitaker-told-trump-he-has-concerns-over-sentencing-reform-bill/2018/11/15/bfe7e2ec-e932-11e8-bd89-ecf3b178206_story.html) (on file with the *Michigan Law Review*) (noting that Acting Attorney General Matthew G. Whitaker expressed "concerns" with the First Step Act to Senator Lindsey Graham); Burgess Everett & Elana Schor, *Cotton Wields Sex Offender Report to Tank Prisons Bill*, POLITICO (Nov. 26, 2018, 1:26 PM), <https://www.politico.com/story/2018/11/26/tom-cotton-criminal-justice-reform-senate->

sion of the bipartisan criminal justice reform bill” that differed from the one President Trump had already endorsed.<sup>110</sup> The DOJ’s revised bill was said to address concerns of some law enforcement groups, but it seemed mostly designed to stanch support from “some Democrats,” thereby endangering the bill’s passage in the Senate.<sup>111</sup> Consequently, White House Deputy Press Secretary Hogan Gidley had to explain to reporters that President Trump was “still backing the original bill, and ‘is not circulating any other version’” of it.<sup>112</sup> So much for the DOJ being subservient to the president.

Clemency is another area where the DOJ and federal prosecutors have thwarted a president’s policy prerogatives. In 2014, President Obama announced an initiative to encourage federal prisoners to petition to have their sentences commuted.<sup>113</sup> President Obama set criteria for his clemency power, and his pardon attorney made numerous favorable recommendations.<sup>114</sup> But Deputy Attorney General Sally Yates overruled the pardon attorney’s favorable recommendations in many individual cases<sup>115</sup> and “secretly kept from the White House the contrary opinions of the DOJ Pardon Office in the many cases in which [the DAG] overruled or refused to act on the Pardon Office’s recommendation for clemency.”<sup>116</sup> Yates did so even though the DOJ had previously stated its commitment to “carrying out this important mission.”<sup>117</sup>

Predictably, the NAAUSA also opposed President Obama’s clemency initiative. In 2015, the NAAUSA sent a letter to President Obama to share its

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republicans-trump-1015149 [https://perma.cc/7D9E-2H8V] (“A new Justice Department analysis—conducted at Cotton’s request—found that the Senate’s bipartisan sentencing and prison reform bill could make people convicted of some sex crimes eligible for early release. And though President Donald Trump supports the bill, Cotton says the DOJ confirmation underpins his argument that convicts of certain sex-related crimes could accrue credits making them eligible for supervised release or ‘pre-release’ to a halfway house.”).

110. Stef W. Kight, *DOJ Floats Revised Version of Trump-Backed Criminal Justice Bill*, AXIOS (Nov. 29, 2018), <https://www.axios.com/criminal-justice-reform-bill-doj-trump-jared-kushner-2907f5cc-2486-4d2a-bc76-66d3907fb94a.html> [https://perma.cc/7VAD-AGWU].

111. *Id.*

112. *Id.*

113. Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 828 (2015). President Obama was not the only president to have his clemency power stymied. President George W. Bush “explicitly complained that he was not being provided with [clemency] grant recommendations when he sought them and urged President Obama to focus on fixing the clemency process.” *Id.*

114. See Michael D. Shear, *Obama’s 78 Pardons and 153 Commutations Extend Record of Mercy*, N.Y. TIMES (Dec. 19, 2016), <https://www.nytimes.com/2016/12/19/us/politics/obama-commutations-pardons-clemency.html> [https://perma.cc/R5KL-XWZM].

115. See Hopwood, *supra* note 4, at 806–07.

116. Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About Criminal Justice Reform*, 128 YALE L.J.F. 848, 915 (2019).

117. See *Announcing New Clemency Initiative*, Deputy Attorney General James M. Cole Details Broad New Criteria for Applicants, U.S. DEP’T JUST. (Apr. 23, 2014), <https://www.justice.gov/opa/pr/announcing-new-clemency-initiative-deputy-attorney-general-james-m-cole-details-broad-new> [https://perma.cc/PZ9H-V8P6].

concerns with granting clemency to “another 91 convicted drug traffickers.”<sup>118</sup> Although there were over 205,000 people in federal prison at the time,<sup>119</sup> the NAAUSA was concerned that the ninety-one grants of clemency “brings to approximately 150 the number of traffickers given early release through executive clemency in just the last 14 months.”<sup>120</sup> The NAAUSA essentially argued that this .07 percent of the federal prison population was unworthy of clemency and that their release was cause for great concern. As with several areas of criminal law policymaking, federal prosecutors have a conflict of interest with clemency, given that the DOJ is “the very agency that prosecuted every federal clemency applicant.”<sup>121</sup> All the more reason to leave clemency decisions to the president.<sup>122</sup>

### CONCLUSION

As Professor Barkow explains, prosecutors are ill-equipped to decide criminal justice policy without bias:

They stand as poor stewards to see whether the overall working of the administration of criminal law furthers public safety and maximizes limited public resources because they have too much to lose if it changes. They possess all the power in the current institutional arrangement and no incentives to let that power go. (p. 133)

On criminal justice reform matters, federal policymakers have listened to federal prosecutors for too long. Federal prosecutors have steadfastly opposed criminal justice reforms even when those reforms would increase public safety and fairness. They have often advocated against reforms in which they have no expertise, such as corrections policy. And a large amount of their opposition revolves around self-interested claims that reform will make their job of prosecuting and incarcerating people more difficult. Worse still, the DOJ and federal prosecutors have undermined the very policy prerogatives of the presidents they serve.

There is no reason for policymakers’ continued deference to the views of federal prosecutors. Unlike federal prosecutors, other policy experts do not possess an inherent conflict of interest in trying to maintain power to the exclusion of all other goals. And a large number of policy experts—from crim-

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118. Letter from Steven Cook to the President, *supra* note 32.

119. See *Past Inmate Population Totals*, *supra* note 13 (showing 205,723 people in federal prison in 2015).

120. Letter from Steven Cook to the President, *supra* note 32, at 1.

121. Paul J. Larkin, Jr., “A Day Late and a Dollar Short”—President Obama’s Clemency Initiative 2014, 16 GEO. J.L. & PUB. POL’Y 147, 161 (2018).

122. Clemency is one of the broadest areas of executive power afforded to any president. U.S. CONST. art. II, § 2, cl. 1 vests the president with the “Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.” For the ways the clemency process could be fixed, see Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1, 5 (2015), and Larkin, *supra* note 121, at 161.

inologists to economists, political scientists, and legal scholars—agree that the criminal justice system can be reformed in ways that protect liberty and improve public safety, human lives, and communities, all at a lower cost. Policymakers should listen to them.



